(19)

In the Supreme Court
OF THE
United States

OCTOBER TERM [redacted] 1925

No. [redacted] 51

SACRAMENTO NAVIGATION COMPANY (a corporation),

Petitioner,

vs.

MILTON H. SALZ, doing business as E. Salz & Son,

Respondent.

MEMORANDUM OF RESPONDENT, MILTON H. SALZ, OPPOSING PETITION FOR CERTIORARI.

S. HASKET DERBY,
CARROLL SINGLE,
Merchants Exchange Building, San Francisco,
Proctors for Respondent.

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The above named respondent, opposing the petition for a writ of certiorari, respectfully shows:

As said by this court, the jurisdiction to issue writs of certiorari is "to be exercised sparingly and only in cases of peculiar gravity and general importance, or

in order to secure uniformity of decision" (*Hamilton Shoe Co. v. Wolf Bros.*, 240 U. S. 251, 259; 60 L. Ed. 629, 633). None of these considerations apply to the case at bar.

The Facts.

Respondent brought suit "in a cause of towage and damages, civil and maritime" (Record, p. 5) and sought recovery for the *negligent towage* of his cargo of barley (loaded on petitioner's barge "Tennessee") by petitioner's steamer "San Joaquin No. 4". The barley was shipped on the barge "Tennessee" at two upper river landings for transportation to Port Costa and shipping receipts were issued by petitioner therefor. After these receipts had been issued and *after* the "Tennessee" had proceeded (in some way not shown by the record) to *Sacramento*, the barge was there picked up by the steamer "San Joaquin No. 4" (Record, pp. 25-26) and, by reason of the latter's *negligent towage*, was brought into collision with another steamer and respondent's cargo was lost.

As held by both of the lower courts the shipping receipts evidenced contracts made solely *with the barge* and not with the towing steamer, which is further borne out by the fact that a considerable part of the voyage had been accomplished before the tow began.

For purposes of convenience and the accommodation of both parties, suit was not brought *in rem* against the "San Joaquin No. 4", but *in personam* against petitioner as her owner and operator. The court should

bear in mind, despite contrary statements by petitioner, that the suit was brought against petitioner *as the owner of the towing steamer* and *not* as the owner of the barge and should be considered on the same basis as if brought *in rem* against the towing steamer. It is *not* a suit based on the contract of affreightment made with the barge, but is a suit for negligent towage pure and simple (Record, p. 7).

The sole question presented by the petition is whether the Harter Act applies to a case of negligent towage. The books are full of cases where towing vessels have been held responsible for loss of or injury to barges and their cargoes and the only way in which this case may differ from those cases is that the barge and the towing steamer were owned by the same person. We submit that the decisions are uniform to the effect that this is a distinction without a difference and that, moreover, the point is hardly one of such "peculiar gravity and general importance" as would justify the issuance of certiorari. The amount involved in the case is some $12,000.00.

The Law.

Section 3 of the Harter Act reads in part as follows:

> "Sec. 3. (Limitation of Liability for Negligent Navigation, Dangers of the Sea, Acts of God, Etc.) That if the owner of *any vessel transporting merchandise* or property to or from any port in the United States of America shall exercise due diligence to make the *said vessel* in all respects seaworthy and properly manned, equipped and supplied, neither the vessel, her owner or owners,

> agent, or charterers shall become or be held responsible for damage or loss resulting *from faults or errors in navigation* or in the management of *said vessel* * * *."

The above italicizing *clearly* shows that the section is only applicable as a defense *to the vessel on which the cargo is carried*, and, as said in the case of *The Delaware*, 161 U. S. 459; 40 L. Ed. 771, its provisions "*have no possible application to the relations of one vessel to another*"—a holding frequently quoted and approved in other cases. We gladly agree with petitioner that the *facts* in the case of *The Delaware* are in no way similar to the facts in the case at bar, but the *principle* there laid down is *directly applicable* and is clearly necessitated by a reading of the Harter Act as above quoted.

The exact question presented in the case at bar is one which rarely arises, but, wherever it has arisen, the Circuit Courts of Appeal have been in complete agreement in regard thereto. Thus the decision of the Circuit Court of Appeals for the Ninth Circuit in the case at bar is squarely supported by two decisions of the Circuit Court of Appeals for the First Circuit.

> *Baltimore & Boston Barge Co. v. Eastern Coal Co.*, 195 Fed. 483 (affirming 200 Fed. 826);
>
> *The Coastwise*, 233 Fed. 1, 3-4 (affirming 230 Fed. 505).

At the risk of unduly lengthening this memorandum, we quote at some length from the case last cited because of its peculiar applicability to the facts of the case at bar:

> "It will be seen that, in The Murrell, this court had before it the case of an agreement by the

owner of a tug to tow another owner's vessel; and this court held that there is nothing in such agreement to make the latter vessel or her cargo, the cargo of the tug. In view of the reasoning of the Supreme Court in The Delaware, it seems clear also that there is nothing in the agreement by the owner of a tug to tow another vessel which can be regarded as making the latter vessel, or her cargo, the cargo of the tug, even when such other vessel belongs to the same owner as the tug. And, in our opinion, this is the law. *A careful examination of the language and history of the Harter Act leads us to the conclusion that section 3 is dealing with the specific vessel in which the merchandise is being transported.* The Irrawaddy, 171 U. S. 187, 195, 196; 18 Sup. Ct. 831, 43 L. Ed. 130; Ralli v. New York & T. S. S. Co., 154 Fed. 287, 83 C. C. A. 290. A similar case was considered by this court, but not decided, in The Cygnet, 126 Fed. 742, 745; 61 C. C. A. 348.

The proofs in the case at bar, however, present a still stronger case for the libelant. *Here the contract of towage was made by the tug; the bill of lading for the cargo was made by the barge.* It is clear, then, that, up to the time when the hawser was passed from the tug to the barge, the coal was the cargo of the barge alone. If, then, we follow the claimant's contention, we are compelled to hold that the cargo was at one time the cargo of the barge alone, and at a later time the cargo of the tug as well. We must conclude, as Judge Dodge did in deciding The Murrell, in the District Court, 209 Fed. 826, 831, that it is difficult to believe that Congress intended a construction of the Harter Act leading to such a result. It is true that for some purposes, the tug may be said to take part in the transportation of the cargo of the barge; and that, where questions of limited liability have arisen, the tug and tow have been regarded as one vessel.* It

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* NOTE.—Even this is no longer the law (*Liverpool etc. Navigation Co. v. Brooklyn etc. Terminal*, cited *infra*).

is urged by the claimant that this doctrine has been carried even further. In The Nettie Quill (D. C.), 124 Fed. 667, the District Court for the Southern District of Alabama had before it the fact that the owner of a steamer making regular trips had agreed to transport a locomotive, under a bill of lading in the usual form; he undertook to carry the locomotive on a barge, towed alongside, and belonging to the locomotive's owner. *This barge was also covered by the bill of lading.* The court held the contract to be one of affreightment, not of towage and subject to the Harter Act. No such question arises in the case at bar. Here the contract with the tug was clearly a contract of towage. *The bill of lading was made with the barge only, not with the tug.* There is nothing to indicate an attempt to combine the tug and barge into a single maritime adventure.

The general rule is stated by the Circuit Court of Appeals in the Second Circuit in The W. G. Mason, 142 Fed. 913, 918; 74 C. C. A. 83, 88, where, in speaking for the court, Judge Wallace said:

'A tug and her tow are deemed a single vessel under steam, within the meaning of the rules of navigation for preventing collisions; but *it has never been asserted elsewhere that they could be regarded as one vessel for the purpose of ascertaining their relations, as between themselves, or their several liabilities to respond for the consequences of a fault of one of them.* Even when two vessels are lashed together, the question of the liability of each always depends upon ascertaining whether that vessel was in fault.'

Judge Wallace cited The James Gray v. John Frazer, 21 How. 184, 16 L. Ed. 106; Sturgis v. Boyer, 24 How. 110, 16 L. Ed. 591; The Carrie L. Tyler, 106 Fed. 422, 45 C. C. A. 374, 54 L. R. A. 236.

Upon the proofs in the case at bar, and upon the facts found correctly by the District Court, it is

> clear, and we must hold, that, within the meaning of the Harter Act, the tug and the barge were not one entity, and the tug Coastwise was not 'transporting merchandise or property'.
>
> The claimant is not exonerated by the Harter Act from liability for loss of the cargo."

It will be noted that the case of *The Nettie Quill,* 124 Fed. 667, also relied on by petitioner, is clearly distinguished in the above citation.

Petitioner cites the decisions of the Circuit Court of Appeals for the Ninth Circuit in the cases of *The Columbia,* 73 Fed. 226, and *The Seven Bells,* 241 Fed. 45, as holding or intimating that tug and tow become one vessel for the purposes of the voyage or "one instrumentality in the voyage". This might be so for some purposes, but in *neither* case was it held or even intimated that the Harter Act would be a defense to the towing vessel in a suit brought by the owner of cargo on the vessel that was being towed. Both of these decisions are clearly distinguished in the opinion in the case at bar (Record, p. 142). Moreover, this theory of "one instrumentality" is, in our opinion, clearly exploded by this court in the case of *Liverpool etc. Navigation Co. v. Brooklyn etc. Terminal,* 251 U. S. 48; 64 L. Ed. 130, holding, in *limitation* proceedings, that such is not the case. The court says:

> "The car float was the vessel that came into contact with the Vauban, but as it was a passive instrument in the hands of the Intrepid, that fact does not affect the question of responsibility. (Citing cases.) These cases show that for the purposes of liability the passive instrument of the

harm *does not become one with the actively responsible vessel by being attached to it.* If this were a proceeding in rem it may be assumed that the car float and disabled tug would escape, and none the less that they were lashed to the Intrepid, and so were more helpless under its control than in the ordinary case of a tow.

It is said, however, that when you come to limiting liability, the foregoing authorities are not controlling,—that the object of the statute is 'to limit the liability of vessel owners to their interest in the *adventure*' (The Main v. Williams, 152 U. S. 122, 131; 38 L. Ed. 381, 384; 14 Sup. Ct. Rep. 486), and that the same reason that requires the surrender of boats and apparel requires the surrender of the other instrumentalities by means of which the tug was rendering the services for which it was paid. It can make no difference, it is argued, whether the cargo is carried in the hold of the tug or is towed in another vessel. *But that is the question, and it is not answered by putting it.* The respondent answers the argument with the suggestion that, if sound, it supplies a different rule in actions in personam from that which, as we have said, governs suits in rem. Without dwelling upon that, we are of the opinion that the statute does not warrant the distinction for which the petitioner contends * * *.

The words of the statute are: 'The liability of the owner of any vessel for any injury by collision shall in no case exceed the value of the interest of such owner in such vessel.' The literal meaning of the sentence is reinforced by the words 'in no case'. For clearly the liability would be made to exceed the interest of the owner 'in such vessel' if you said frankly, 'In some cases we propose to count other vessels in although they are not "such vessel";' and it comes to the same thing when you profess a formal compliance with the words, but reach the result by artificially construing 'such

vessel' to include other vessels if only they are tied to it."

Petitioner seeks to distinguish this case on the ground that it involves the Limited Liability Act, the provisions of which are not similar to the Harter Act. It is submitted, however, that just as, under the former act, only the vessel doing the damage can be held liable, so, under the latter act, only the vessel *actually carrying the cargo* can claim its benefit. We think it clear that the one conclusion follows the other and we have already shown that a fair reading of the Harter Act necessarily involves this construction.

Petitioner also refers to the case of *The Northern Belle*, 9 Wall. 526; 19 L. Ed. 746. In that case the *barge* on which the cargo was carried *was unseaworthy* and the court held that the case turned entirely on that point. The passage from the case cited by petitioner (Brief, p. 14) is mere dictum and must be considered in the light of the later decision in *Liverpool etc. Co. v. Brooklyn etc. Terminal, supra.*

Petitioner frequently says that there was no towage contract made in this case. Admitting that respondent may not have itself made a towage contract, it granted petitioner the "privilege of towing" and, even apart from this, contracts can be implied as well as express and, when petitioner engaged its steamer for the tow, it made an implied contract with respondent for such towage. If it had (as it might have done) engaged the steamer of a third party to make the tow, such steamer

would clearly have made an implied contract with respondent through the petitioner and would obviously have been liable for the loss. How, then, can petitioner be relieved when it engaged its own steamer? The two cases are parallel.

We submit that the law governing the case at bar is clear and uniform and that it was correctly applied by the Circuit Court of Appeals.

Conclusion.

It is finally submitted that not only are the concurring decisions of the two lower courts right and in accordance with decisions elsewhere, but also that the question involved is *in no sense* of "peculiar gravity and general importance". On the contrary, the question involved is one which seldom arises, of no gravity and of importance only to a few river carriers operating both steamers and barges of their own. We therefore submit that the petition for certiorari should be denied.

Dated, San Francisco,
March 25, 1925.

Respectfully submitted,

S. Hasket Derby,
Carroll Single,
Proctors for Respondent.

ENTRY OF APPEARANCE.

The undersigned hereby enter their appearance in the above cause as counsel for the respondent, Milton H. Salz.

Dated, San Francisco,
March 25, 1925.

S. HASKET DERBY,
CARROLL SINGLE,
Proctors for Respondent.